Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1513

UNITED STATES OF AMERICA, *Appellant*

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, *Appellee*

On Appeal From the United States Court of Claims

APPELLEE'S BRIEF

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IN THE
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No. 78-1513

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK, MINOR CHILDREN, APPELLEE

ON APPEAL FROM
THE UNITED STATES COURT OF CLAIMS

APPELLEE'S BRIEF

This brief is submitted on behalf of appellee Patricia Ilene Clark, guardian for Shawn D. Clark and Tricia D. Clark, in opposition to the Government's appeal on the merits and in support of appellee's continuing motion to dismiss said appeal on the grounds (a) it is not within this Court's jurisdiction under 28 U.S.C. 1252 and (b) the appeal fails to present a substantial

federal question for review.

OPINIONS BELOW

The summary judgment rendered by the Court of Claims on January 27, 1978 is not officially reported, but is printed in the Appendix, at pages 25-27. The Government's stipulation for entry of a money judgment in favor of appellee and her minor wards is printed in the Appendix, at pages 28, 29, and the money judgment thereafter entered by the Court of Claims on November 6, 1978 pursuant to said stipulation is printed in the Appendix at pages 30, 31.

JURISDICTION

The Government's jurisdictional claim is predicated exclusively on 28 U.S.C. 1252 and on May 21, 1979, this Court postponed further consideration of the question of jurisdiction to the hearing of this case on the merits. Appellee thus continues to contend this Court does not have jurisdiction over this case under 28 U.S.C. 1252 for three (3)

reasons as follows:

1. The Government did not appeal from the Court of Claims' summary judgment of January 27, 1978 (App., pgs. 25-27) under 28 U.S.C. 1252 "within thirty days after the entry of [that] interlocutory or final order, judgment or decree" in the manner prescribed by 28 U.S.C. 2101(a) – and no extension of that appeal time was sought from or granted by this Court or any Justice thereof.

2. The summary judgment granted by the Court of Claims on January 27, 1978 (App., pgs. 25-27) does not invalidate or hold unconstitutional any Act of Congress. Rather, pursuant to the Government's concession that the Court of Claims' prior rulings in Gentry v. United States, 212 Ct. Cl. 1, 546 F.2d 343 (1976) – from which the Government took no appeal – are "dispositive of the case now before us" [1/] – the court below summarily granted judgment in favor of the two minor

1/ Appendix, pg. 26.

children in this case for survivors' benefits under 5 U.S.C. 8341(e), the Civil Service Retirement Act. 2/

3. The subsequent money judgment entered by the Court of Claims on November 6, 1978 pursuant to the Government's stipulation, 3/ likewise does not invalidate or hold unconstitutional any Act of Congress, as required by 28 U.S.C. 1252. Rather, said order merely grants a regular money judgment in favor of the aforementioned minor children based on the Government's stipulation for entry of judgment.

QUESTIONS PRESENTED

This case accordingly presents the following questions for review:

1. Does this Court have jurisdiction over this particular case under 28 U.S.C. 1252 in view of (a) the Government's complete failure to file any appeal from the Court of Claims' 1976 rulings in Gentry v. United States,

2/ Appendix, pgs. 26, 27.
3/ Appendix, pgs. 28, 29.

supra, (b) the Government's similar failure to file a timely appeal with reference to the Court of Claims' summary judgment of January 27, 1978 in this case, and (c) the fact that neither the Court of Claims' summary judgment of January 27, 1978 nor its subsequent stipulated money judgment of November 6, 1978 actually, in and of themselves, invalidate or hold unconstitutional any Act of Congress?

2. Did the Court of Claims have jurisdiction under the Tucker Act (28 U.S.C. 1491) to render a money judgment in this case based strictly on a money claim for statutory survivors' benefits under the Civil Service Retirement Act, as amended (5 U.S.C. §§8331-48 (1970)), and to order, pursuant to 28 U.S.C. 1491, that the minor children be placed on the annuity rolls for future annuity payments?

3. Should this Court ignore the specious constitutional questions belatedly

raised by the Government and simply affirm the Court of Claims' summary judgment on the ground that the minor children involved in this case are entitled to their survivors' annuity under 5 U.S.C. 8341, properly and fairly construed? If the Court agrees with this premise, then must not the Government's appeal be dismissed for failure to present a constitutional question for review?

4. Assuming this Court reaches the merits of the Government's constitutional arguments in this case, the following additional questions are then presented:

(i) Is it constitutionally permissible under the Fifth Amendment for the Civil Service Retirement Act to be applied by the Government in such manner that it discriminates against lawful, recognized natural children of deceased federal civil service employees by denying them their statutory survivors' annuity solely because they did not continuously live with their deceased

father up to the date of his death while (a) other lawful natural children of such employees receive their annuities without any such requirement and (b) even adopted children, children for whom an adoption petition has been filed and stepchildren receive annuities merely because they actually resided with their deceased fathers at the time of death?

(ii) Should the Government be allowed at this late date suddenly to revive and reinstate that old insidious, discriminatory application of the Civil Service Retirement Act in this case in the face of (1) an unbroken, unanimous line of federal decisions which have repeatedly declared that requirement unconstitutional, without any effort on the part of the Government to appeal to this Court and (b) recent statutory proposals by the Government itself for permanent removal of that requirement insofar as future annuity claims by children of federal employees are concerned?

STATUTORY PROVISIONS INVOLVED

All pertinent statutory provisions are set forth in the Government's brief at pages 2-5. The Government's pending statutory proposals for elimination of the "lived-with" requirement of 5 U.S.C. 8341 (a)(3)(A) are set forth in the Appendix to this brief, together with its testimony in support thereof.

COUNTER-STATEMENT OF THE CASE

Prior to his death on August 17, 1974, George G. Isaacson was a federal civil service employee employed at the Veterans Administration Center in Fort Harrison, Montana (A.12). 4/ Shawn Douglas Clark and Tricia Deanne Clark, his children and both of whom are minors, were born in 1968 and 1971, respectively (A.12). At the time of their births, their father, Mr. Isaacson, and their mother, Patricia Ilene Clark, appellee herein, were not formally married. However, during the period from in or

4/ References to the printed Appendix are indicated by "A." and the page number.

about 1965 through at least 1971, Mr. Isaacson and Ms. Clark openly lived together in the same domicile as husband and wife, and after Shawn and Tricia were born, they continued to live together with them as their mother and father (A.7).

Subsequently, Ms. Clark filed suit against Mr. Isaacson in a court of competent jurisdiction in Montana to establish his paternal relationship to Shawn and Tricia, and to obtain a judicial decree ordering him to support the two children (Clark v. Isaacson, No. 5625, District Court, First. Jud. Dist., Broadwater County, Montana, App. A to this brief). Mr. Isaacson personally appeared in that action, and he was represented by counsel. After a trial which lasted three (3) days, and after receiving a written stipulation of proposed support from Mr. Isaacson, the Montana court issued the following Judgment on June 2, 1972, more than two (2) years before Mr. Isaacson's accidental death in

1974 (App. A hereto):

"Upon the foregoing Findings of Fact And Conclusions Of Law, It Is Hereby Ordered, Adjudged and Decreed As Follows:

"(1) That the Defendant, George Gerald Isaacson, is the father of Shawn Douglas Clark, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of Tricia Deanne Clark, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

"(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

"(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

"(4) That Defendant change the beneficiaries under the following policies to make Shawn Douglas Clark and Tricia Deanne Clark first beneficiaries, to wit:

"(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

"(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00) . . . ."

Accordingly, up to the time of his death in August, 1974, Mr. Isaacson regularly complied with the Montana decree and provided monthly support payments to his lawful children, Shawn and Tricia. Indeed, also pursuant to said decree, they were his named life insurance beneficiaries at the time of his death in 1974.

Shortly after Mr. Isaacson's death, therefore, an appropriate application was filed with the Civil Service Commission on behalf of Shawn and Tricia requesting payment of the Survivors' Annuity prescribed by 5 U.S.C. 8341 for children of civil service employees who die without a surviving spouse (5 U.S.C. 8341(e)(1)). Under 5 U.S.C. 8341(a)(3)(A), such annuities are payable to "any unmarried child under 18 years

of age," including –

"(i) an adopted child, and

"(11) a stepchild or recognized natural child who lived with the employee . . . in a regular parent-child relationship." [Emphasis supplied.]

On September 27, 1974, however, the Commission's Bureau of Retirement Insurance and Occupational Health denied appellee's application on the ground that Shawn and Tricia allegedly "did not live with the decedent in a regular parent-child relationship" (A.4). The Bureau thus directed that said annuity be paid to Mr. Isaacson's surviving father in one lump sum payment, but he promptly offered to return the money if the Commission would recognize the statutory annuity rights of his deceased son's children, Shawn and Tricia (A.6).

An appeal was thus filed on behalf of Shawn and Tricia with the Commission's Board of Appeals and Review. A series of affidavits were submitted which established that (1) Mr. Isaacson and Ms. Clark openly lived together as man and

wife in the same domicile commencing in 1965, and (2) after Shawn and Tricia were born, the family continued openly to live together in the same dwelling through 1971 (A. 6, 7). In addition, a copy of the Montana court decree was filed in evidence, and the Board was apprised of the willingness of Mr. Isaacson's father to refund the lump sum annuity paid to him as aforesaid (A. 6). Nevertheless, the Board of Appeals affirmed the Bureau's earlier action stating (A. 7-9):

> "The certificate of death for George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits giving detailed information concerning his alleged parent-child relationship with the Clark children all stated that the alleged relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which decedent was ordered to support the Clark children, is dated June 2, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the Clark children from at least 1972 until the date of his death in 1974. The Board therefore concurs with the BRIOH decision that a regular parent-child relationship did not exist between the deceased and Shawn and Tricia Clark . . ..

"The Board notes appellants' argument that 5 U.S.C. 8341 is unconstitutional. However, until this provision of the retirement law is held unconstitutional by a court of competent jurisdiction, the Commission has no alternative but to continue its enforcement."

On July 9, 1976, therefore, appellee commenced the instant action in the United States Court of Claims demanding payment of the survivors' annuity lawfully owed to Shawn and Tricia under 5 U.S.C. 8341 — and after the Government filed its answer, she moved for summary judgment.

On November 17, 1976, the Court of Claims rendered its judgment in another case, Gentry v. v. United States, 212 Ct. Cl. 1, 546 F.2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F.2d 852 (1977). In that case, the Court of Claims ruled (a) it had full statutory jurisdiction under the Tucker Act (28 U.S.C. 1491) over claims for statutory survivor benefits unlawfully withheld by the Government under the Civil Service Retirement Act (5 U.S.C. 8341), and (b) that the "lived with" requirement of

5 U.S.C. 8341(a)(3)(A) is "severable from the legislative scheme of that statute, when read in light of the Fifth Amendment" because (1) it conflicts with the overall aim of the statute, which is to aid dependents of federal employees; (2) it does not promote any goal of preventing spurious claims; and (3) it cannot be sustained as a recognizable aid to administrative convenience.

The Government failed to file any appeal to this Court from the Court of Claims' judgment in Gentry, supra. Indeed, in its jurisdictional statement in this case, the Government states that "[s]everal other lower federal courts have declared the lived with requirement [of 5 U.S.C. 8341] unconstitutional," and that none of those decisions have been disturbed by this Court, albeit the issue has been here before. 5/

5/ Government's jurisdictional statement, pg. 7, ftnt. 5.

Thus, in this case, after the decision in Gentry, the Government notified the Court of Claims that, in its view, "Gentry, supra, is dispositive of the case now before us" (A. 26). Hence, without discussing any of the jurisdictional or constitutional issues settled by Gentry, without appeal to this Court, the Court of Claims, on January 27, 1978, granted appellee's motion for summary judgment in this case, stating (A. 27):

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341. Because the court has previously held a portion of 5 U.S.C. §8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute."

As indicated above, the Government filed no appeal from this judgment under 28 U.S.C. 1252 within the 30-day period prescribed by 28 U.S.C. 2101(a) — and ultimately, after

further unconscionable procrastination, the Government agreed to stipulate for the entry of a money judgment in favor of Shawn and Tricia (A. 28,29). That judgment issued on November 6, 1978. Then, and only then, did the Government file a Notice of Appeal on December 5, 1978.

Still, it delayed the filing of its jurisdictional statement until April 4, 1979 — so that for more than five (5) full years, it has successfully deprived the two (2) minor children involved in this case of the unqualified right to their lawful statutory annuity. 6/ Now, five (5) years after this case began, the Government advises this Court in its jurisdictional statement that, while it continues relentlessly and capriciously to press its malin-

6/ Pursuant to the Court of Claims' judgment of November 6, 1978, the Government placed Shawn and Tricia on the annuity rolls effective June 30, 1978, and thus they have been receiving an annuity of $187 per month each since June 30, 1978. They have not yet received, of course, their annuities back to their father's date of death in August, 1974.

gering, baseless defense against Shawn and Tricia's annuity claim under 5 U.S.C. 8341 7/ -

> "OPM [successor to the Civil Service Commission] has recommended legislation to the current Congress that it eliminate the lived with requirement [from 5 U.S.C. 8341] . . . ."

SUMMARY OF ARGUMENT

I

Neither the Court of Claims' summary judgment of January 27, 1978 nor the stipulated money judgment of November 6, 1978 held any "Act of Congress unconstitutional." Thus, this Court has no basis for extraordinary mandatory jurisdiction under 28 U.S.C. 1252 in this case.

Assuming arguendo, the Court of Claims' summary judgment of January 27, 1978 can be construed to raise a valid constitutional issue for review, this Court still has no jurisdiction under 28 U.S.C.

7/ Government's jurisdictional statement, pg. 10, ftnt. 8. See H.R. 2584, 96th Cong., 1st Sess. (1979), found in Appendix B to this brief.

1252 because the Government failed to appeal from that judgment within thirty (30) days as required by 28 U.S.C. 2101 (a).

28 U.S.C. 1252 allows appeals from both interlocutory and final judgments, and in McLucas v. DeChamplain, 421 U.S. 21, 31, this Court ruled the statutory purpose of 28 U.S.C. 1252 was "to afford immediate review . . . in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." Here, the Government felt no need for "immediate review," and thus it waited more than ten (10) months to appeal, after having failed to appeal from four prior judgments in other cases which found the statute here involved unconstitutional.

Under such circumstances, the Government's remedy is the more leisurely certiorari process, not a direct appeal

under 28 U.S.C. 1252.

II

The Court of Claims plainly had jurisdiction over the money claim for a survivors' annuity in this case (United States v. King, 395 U.S. 1; United States v. Testan, 424 U.S. 392); and under 28 U.S.C. 1491, it has the power to supplement its money judgment against the United States with a directive to the Civil Service Commission that the minor children be added to the annuity rolls for future payments as they became due.

Moreover, this Court has repeatedly recognized the power of federal courts to enter money judgments for survivors' benefits in cases where discriminatory provisions of the federal statute providing such benefits are rejected on constitutional grounds (Weinberger v. Weisenfeld, 420 U.S. 636, affg. 367 F.Supp. 981; Califano v. Goldfarb, 430 U.S. 199, affg. 396

F.Supp. 308). Indeed, all the jurisdictional arguments raised by the Government in this case were rejected by the Court of Claims in Gentry v. United States, 546 F.2d 343 (1976), and the Government failed to appeal or seek certiorari.

Finally, the Government failed here to raise any issue regarding the Court of Claims' jurisdiction in that court, and it actually stipulated in writing for the entry of both the money judgment and the supplemental directive that Shawn and Tricia be placed on the annuity rolls for future payments.

III

It is clearly unnecessary for this Court to reach the constitutional issues raised by the Government's appeal because, under the facts of this case, Shawn and Tricia meet all the statutory requirements for a survivors' annuity under 5 U.S.C. 8341(a)(3)(A), fairly and properly construed.

In this regard, the Court of Claims entered judgment in their favor because, on the uncontested facts, they meet all the parentage, recognition and support requirements for recovery under 5 U.S.C. 8341(a)(3)(A). The Government challenges that ruling solely because it contends the "lived with" provision of 5 U.S.C. 8341(a)(3)(A) required Shawn and Tricia physically to live with their deceased father under the same roof on the date of his death, whereas they physically lived with him only thorugh 1971 (A.7).

Fairly construed, however, 5 U.S.C. 8341(a)(3)(A) does not require Shawn and Tricia to show they physically lived with their father under the same roof on the date of his death. Rather, it requires merely a showing that they "lived with the employee . . . in a regular parent-child relationship" at some time prior to his death. Shawn and Tricia made such show-

ing, and buttressed it with proof that, in 1972, during the employee's lifetime, a Montana court of competent jurisdiction adjudged him their father and ordered him to support them, which he thereafter did to the date of his death.

Consequently, this Court should affirm the Court of Claims' summary judgment under 5 U.S.C. 8341(a)(3)(A) without reviewing the constitutional questions presented by the Government. In such event, the Court of Claims clearly had jurisdiction to render a money judgment based on the statute thus construed, and the Government's direct appeal must be dismissed under 28 U.S.C. 1252 for failure to raise a reviewable constitutional issue.

IV

If the Court finds it necessary to reach the constitutional issues so belatedly raised by the Government in this Court after it stipulated to judgment in the

Court of Claims, then it is clear, under the facts of this case, that the Fifth Amendment prohibits the Government from discriminatorily and arbitrarily applying the "lived with" provision of 5 U.S.C. 8341(a)(3)(A) in such a distorted, unreasonable manner as to deprive Shawn and Tricia of their statutory indemnity (Jimenez v. Weinberger, 417 U.S. 628; Trimble v. Gordon, 430 U.S. 762, Lalli v. Lalli, ____ U.S. ____, 99 S.Ct. 518; Gentry v. United States, supra, Myers v. Hampton, No. 8682 (S.D. Ohio, 1977); Tenny v. United States, 441 F.Supp. 224; Proctor v. United States, 448 F.Supp. 418; Jenkins v. United States, 460 F.Supp. 611, app. pend.).

In the case at bar, Shawn and Tricia not only "lived with" their deceased father in a regular parent-child relationship prior to 1972, but in 1972, during the father's lifetime, he was adjudged their

father and ordered to support them by a Montana court of competent jurisdiction — and he thereafter supported them to the date of his death.

The basic purpose of the Civil Service Retirement Act is to guarantee a survivors' annuity to all unmarried children of deceased federal employees under 18 years of age — even adopted children, stepchildren and children for whom a petition of adoption is pending when the employee dies. That statutory purpose is clearly defeated by any arbitrary, tortured application of the "lived with" provision which precludes lawful natural children such as Shawn and Tricia from their statutory annuity after a court of competent jurisdiction established both their father's paternity and obligation to support them while he was alive and a full participant before the court in Montana.

V

Finally, the "lived with" requirement, as arbitrarily applied by the Government in this case, cannot be sustained as necessary to prevent spurious claims or to facilitate administration of the Civil Service Retirement Act in the face of (A) the Government's failure to appeal from at least four (4) other prior federal decisions which either nullified or enjoined the enforcement of that provision and (B) the Government's current legislative drive permanently to repeal that requirement. As stated by the Government in a carefully secluded footnote in its brief:

> "OPM has recommended legislation that would eliminate the lived with requirement."

ARGUMENT

I

THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE UNDER 28 U.S.C. 1252

On May 2, 1979, appellee moved to dismiss the Government's appeal because it is not within this Court's jurisdiction under 28 U.S.C. 1252. On May 21, the Court postponed further consideration of that question so that issue must be settled at this time.

Essentially, appellee's motion to dismiss for lack of jurisdiction is based on two (2) grounds:

1. Neither the Court of Claims' summary judgment of January 27, 1978 nor the stipulated money judgment of November 6, 1978 held any "Act of Congress unconstitutional." Thus, this Court has no basis for extraordinary mandatory jurisdiction under 28 U.S.C. 1252 in this case.

2. Assuming arguendo, as the Government contends, that the Court of Claims'

summary judgment of January 27, 1978 may be tortured into a "holding of unconstitutionality" merely because the court accepted the Government's concession that a 1976 ruling in Gentry v. United States, supra, was "dispositive of the case now before us" (A. 26), then this Court still has no jurisdiction under 28 U.S.C. 1252 at this late date because the Government failed to appeal from that alleged January 27, 1978 "holding of unconstitutionality" within thirty (30) days, as required by 28 U.S.C. 2101(a).

28 U.S.C. 1252, of course, provides that an appeal may be taken from either "an interlocutory or final judgment, decree or order . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party." 28 U.S.C. 2101(a), in turn, prescribes that the appeal to this Court under 28 U.S.C. 1252 "shall be taken within thirty

days after the entry of the interlocutory or final order, judgment or decree."

In McLucas v. DeChamplain, 421 U.S. 21 31, 95 S.Ct. 1365, 1371, 43 L.Ed. 2d 699 (1975), this Court construed 28 U.S.C. 1252 to authorize and require "immediate review in this Court," irrespective of the form (interlocutory or final) of lower court orders which clearly invalidate Acts of Congress. Mr. Justice Powell, writing for the Court, stated:

> "The language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality. The purpose of §1252 is too plain to allow circumvention . . . ." [Emphasis supplied.]

Appellee strenuously contends that neither the Court of Claims' summary judgment of January 27, 1978 nor the Court of Claims' subsequent stipulated money judgment of November 6, 1978 in this case held

an Act of Congress unconstitutional. Rather, the statute involved in this case was ruled unconstitutional by at least four (4) courts prior to 1978 (Gentry v. United States, 546 F.2d 343 (Ct. Cl. 1976), rehearing denied, 551 F.2d 852 (1977); Myers v. Hampton, S.D. Ohio, 1977, No. 8682; Tenny v. United States, 441 F. Supp. 224 (E.D. Mo. 1977); and Proctor v. United States, 448 F. Supp. 418, (D.C.D.C. 1977)) - and thus, in this case, the Government merely conceded that these prior holdings were "dispositive of the case now before us," so summary judgment was granted in favor of appellee without any need to hold "any Act of Congress unconstitutional" (A. 26, 27).

In other words, the Government, already bound by a series of four (4) prior holdings of unconstitutionality which had become final and from which it did not appeal to this Court under 28 U.S.C. 1252 - simply conceded the issue in this case,

so the Court of Claims entered summary judgment for Shawn and Tricia Clark without in any respect reconsidering or ruling on the matter of 5 U.S.C. 8341's constitutionality (A. 25-27). The basis of the decision below was not that the Act of Congress was unconstitutional (United States v. Raines, 362 U.S. 17, 20, 80 S.Ct. 519, 522, 4 L. Ed.2d 524 (1960)). Rather the basis of the decision below was the Government's flat concession that Shawn and Tricia were entitled to summary judgment as a matter of law. 8/ Thus, the Court of Claims merely

8/ A narrow construction of 28 U.S.C. 1252 justly to dispose of this case on jurisdictional grounds is "consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration" (Gonzalez v. Automatic Credit Union, 419 U.S. 90, 98, 95 S.Ct. 289, 294, 42 L.Ed.2d 249 (1974)). Also, this Court has regularly construed 28 U.S.C. 1253 narrowly to allow mandatory direct appeals only from orders "actually entered by three-judge courts" (Gonzalez, supra; Idlewild Bon Voyage Liq. Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Hicks v. Pleasure House, Inc., 404 U.S. 1, 92 S.Ct. 5, 30 L.Ed.2d 1 (1971)).

held (A.27):

> "In summary, on the uncontested facts of parentage, recognition and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341(e)."

But, even assuming arguendo, as the Government contends, that somehow the Court of Claims' judgment of January 27, 1978 can be twisted into a "holding of unconstitutionality," this Court still has no jurisdiction under 28 U.S.C. 1252 because the Government failed to appeal from that summary judgment for more than ten (10) months — whereas 28 U.S.C. 2101(a) requires such appeals to be taken within thirty (30) days whether that order be construed "interlocutory" or "final" (Whitsitt v. Union Depot & R.R. Co., 122 U.S. 363, 7 S.Ct. 1248, 30 L.Ed. 1150 (1887); Glasgow Navigation Co., Ltd. v. Munson Steamship Line, 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); Collard v. Pittsburgh C.C. & St. L.Ry.Co.,

246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); Citizens Bank of Michigan City v. Opperman, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919); Rust Land & Lbr. Co. v. Jackson, 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); Hartford Accident & Indemnity Co. v. Bunn, 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed. 1301; Matton Steamboat Company v. Murphy, 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); Cole v. Violette, 319 U.S. 581, 63 S.Ct. 1204 (1943); Parish v. Maryland and Virginia Milk Producers Association, Inc., ____ U.S. ____, 99 S.Ct. 1507 (1979)).

The Government argues in its brief that "there is no need to seek immediate review" under 28 U.S.C. 1252; that when federal statutes are ruled unconstitutional by valid lower court judgments, mandatory direct appeals to this Court can be

delayed until money damages are computed by stipulation of the parties, even if that consumes months or years. But, that argument is contrary to both the plain intent and purpose of 28 U.S.C. 1252 itself and this Court's recent decision in McLucas v. DeChamplain, supra, where it was held:

> "The language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality . . .."

If an Act of Congress is ruled unconstitutional, the Government has the duty and right under 28 U.S.C. 1252 to seek "immediate review," whether the ruling of unconstitutionality be deemed "interlocutory" or "final." The Government cannot sit idly by for years -- while one federal court after another rules a statute unconstitutional -- and then sit by for months when allegedly a fifth or sixth federal court

follows suit without seeking its right to "immediate review." This is outlawed by 28 U.S.C. 2101(a), which requires such direct appeals to be filed within thirty (30) days. If the Government can afford the type of delays it describes in its brief, then a mandatory direct appeal to this Court is clearly unnecessary, and the Government should be remitted to its right to proceed by certiorari.

II

THE COURT OF CLAIMS PLAINLY HAD JURISDICTION OVER APPELLEE'S MONEY CLAIM FOR SURVIVORS' ANNUITY UNDER THE CIVIL SERVICE RETIREMENT ACT. INDEED, THE GOVERNMENT STIPULATED IN WRITING THAT THE COURT OF CLAIMS COULD ENTER BOTH A MONEY JUDGMENT FOR PAST ANNUITIES DUE, AND THAT SHAWN AND TRICIA SHOULD BE PLACED ON THE ANNUITY ROLLS FOR FUTURE ANNUITY PAYMENTS

The Government, which stipulated in writing in this case that the Court of Claims should (a) enter a money judgment in favor of Shawn and Tricia for past annuities due under the Civil Service Retirement Act, and (b) issue an order that they be placed on the "annuity rolls for continued payments of children's survivor

annuity pursuant to 5 U.S.C. §8341(e) from June 30, 1978 until their eligibility expires" (A. 28, 29), now outrageously asks this Court to nullify the actions the Court of Claims took pursuant to that stipulation (A. 30, 31) because allegedly (1) "there was no money due under the Civil Service Retirement statute" and (2) "the Constitution itself neither requires nor authorizes an award of money damages as a remedy for any unconstitutionality there may be in the statute. 9/

The President of the United States recently stated in a nationwide telecast that the people are sadly losing faith and confidence in their Government. That is hardly surprising when the Government behaves in the fashion described above in a case involving two minor children and their prayer for payment of an extremely modest survivors' annuity prescribed by an Act of

9/ See Government's brief, pg. 18.

Congress.

In any event, the Court of Claims plainly has jurisdiction, under 28 U.S.C. 1491 –

> "to render judgment on any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . . To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any judgment, issue orders directing . . . placing in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

Thus, it is clear beyond peradventure that both the Government's stipulation for judgment, and the judgment entered on that stipulation by the Court of Claims in this

case, are well within the broad jurisdiction bestowed on that court by Congress. Indeed, throughout its entire history, since it was established in 1855, the Court of Claims has had jurisdiction over money claims against the United States based on Acts of Congress (United States v. King, 395 U.S. 1, 2-3, 89 S.Ct. 1501, 1502 (1969); United States v. Testan, 424 U.S. 392, 397-98, 96 S.Ct. 948, 953, 47 L.Ed. 2d 114 (1976)). In this case, Shawn's and Tricia's claim is strictly a money claim for statutory survivors' annuity based on an Act of Congress, the Civil Service Retirement Act (5 U.S.C. 8341(e)). That Act of Congress specifically sets forth the amounts of money due and payable to children of deceased federal employees (5 U.S.C. 8341(e)), and here the suit in the Court of Claims seeks collection of that statutory debt of the United States to Shawn and Tricia, the children of

a deceased federal employee covered by that statute.

Their claim asserts, and the Court of Claims has ruled, that the Civil Service Retirement Act "confers a substantive right to recover money damages from the United States" (United States v. Testan, supra, at 424 U.S. 398). By expressly providing a statutory commitment to pay specific survivors' annuity to children of deceased federal employees – even to adopted children and stepchildren (5 U.S.C. 8341(a)(3)(A))– the United States waived its sovereign immunity and made itself statutorily liable for such payments in the Court of Claims (United States v. Testan, supra, at 424 U.S. 399). And, having rendered judgment against the United States on that statutory money claim, the Court of Claims had the additional statutory authority under 28 U.S.C. 1491 to direct the administrators of the

Civil Service Retirement Act to place Shawn and Tricia on the annuity rolls for future payments, as the Government itself specifically directed in its written stipulation.

Moreover, this Court has recently repeatedly approved payment of federal survivors' benefits in cases where discriminatory provisions of the federal statute providing such benefits were stricken on constitutional grounds – in other words, the benefits were ruled payable under the statute with the unconstitutional requirements deleted (Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), affg. 367 F.Supp. 981; Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), affg. 396 F.Supp. 308). And, in Gentry v. United States, 212 Ct.Cl.1 546 F.2d 343 (1976), rehearing denied, 212 Ct. Cl.27, 551 F.2d 852 (1977), the

Court of Claims flatly rejected all jurisdictional arguments advanced by the Government in this Court, and the Government failed to appeal.

The Government completely failed to question the Court of Claims' jurisdiction in its answer in this case (A. 20, 21) – and based on its subsequent stipulations and concessions, the Court of Claims entered judgment for Shawn and Tricia clearly within the bounds of its jurisdiction under 28 U.S.C. 1491. In the face of this record and in light of the aforementioned authorities, the Government's baseless attempt to create for the first time some vague jurisdictional issue in this Court on a direct appeal under 28 U.S.C. 1252 must be rejected.

III

IT IS UNNECESSARY FOR THIS COURT TO REACH THE CONSTITUTIONAL ISSUES RAISED BY THE GOVERNMENT'S APPEAL BECAUSE, UNDER THE FACTS OF THIS CASE, SHAWN AND TRICIA MEET ALL THE STATUTORY REQUIREMENTS OF 5 U.S.C. 8341 FOR A SURVIVORS' ANNUITY. IF THE COURT AGREES, THE GOVERNMENT'S APPEAL UNDER 28 U.S.C. 1252 MUST BE DISMISSED BECAUSE NO REAL CONSTITUTIONAL ISSUE WOULD REMAIN IN THIS CASE

5 U.S.C. 8341(a)(3)(A), as pertinent to this case, provides:

> "(a) For the purpose of this section — . . .
>
> "(3) 'child' means —
>
> "(A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship . . .."

In this case, in response to the Civil Service Commission's request for at least two (2) affidavits (A. 5), three (3) affidavits by disinterested parties were filed with the Government which established that Shawn and Tricia "lived with" their deceased father and their mother in the same domicile "in a regular parent-child relationship" during the period from their respective births through 1971 (A. 5-7).

Thereafter, in 1972, the father not only "recognized" Shawn and Tricia, he appeared in a formal Montana court proceeding wherein he was adjudged their father (App. A. to this brief). He was thereupon ordered by the Montana court to support the two children, and he did support them to the date of his death in 1974, and even after his death, through life insurance payments (A. 6, 7; Appendix A hereto).

Patently, therefore, Shawn and Tricia meet all the requirements of 5 U.S.C. 8341 (a)(3)(A), and thus they are entitled to the survivors' annuity they claim under the statute as it was enacted by Congress. They "lived with" the deceased federal employee "in a parent-child relationship" through 1971, and he not only "recognized" them — he was judicially decreed their

father and he was responsible for their support through the date of his death under that decree. Ergo, the Court of Claims correctly entered summary judgment in favor of Shawn and Tricia, as a matter of law, stating (A. 27):

> "In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. §8341(e)."

Accordingly, we respectfully urge this Court to construe 5 U.S.C. 8341 in the same manner at this time, and thereby affirm the Court of Claims' judgment without reaching the constitutional questions spuriously raised by the Government's appeal. In such event, of course, (a) all "issues" raised by the Government regarding the Court of Claims' jurisdiction would automatically fall, and (b) the Government's direct appeal under 28 U.S.C. 1252 would have to be dismissed because no real constitutional

issue would remain for review.

Indeed, this case never would have reached the Court of Claims in the first place if the Civil Service Commission and its Board of Appeals and Review had correctly construed 5 U.S.C. 8341(a)(3)(A), as plainly enacted and intended by Congress. As shown above, under that statute as drafted by Congress, adopted children, stepchildren and recognized natural children all qualify for survivors' annuities if they can show they "lived with the employee . . . in a regular parent-child relationship." Here Shawn and Tricia proved they "lived with" their deceased father in a parent-child relationship (i.e., openly in the same domicile) through 1971. This, we respectfully submit, was a sufficient showing to meet the statutory requirement. But, the Commission arbitrarily and capriciously misconstrued the statutory requirement,

stating (A. 6, 7):

> ". . . acknowledged illegitimate children may be entitled to a survivor annuity if . . . they lived with an employee in a regular parent-child relationship . . . .
>
> "The Commission has constantly held that the 'living with' requirement is not met when the parent maintains a residence different from the child or if the parent and child are not living together at the time of the employee's death. The use of the language "had lived" in the instructional material in the FPM is not viewed as meaning that the existence of a past parent-child relationship qualifies the child for a survivor annuity. The provision of the retirement law which defines the term 'child' for survivor annuity purposes also speaks in the past tense, but this is understandable since the death of the employee terminates the relationship. However, it is the Commission's position that the circumstances in a particular case must be such as to establish that the "lived in a parent-child relationship" existed to the time of death of the employee. There is no such showing in this case.
>
> "The certificate of death of George Gerald Isaacson indicates that his date of death was August 17, 1974. The affidavits . . . stated that the alleged ["lived with"] relationship existed from either 1965 or 1966 until 1971. Indeed, the formal decree of the Montana court, in which the decedent was ordered to support the children, is dated June 9, 1972. Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the children from at least 1972 until the date of his death in 1974." [Emphasis supplied.]

The Commission thus totally misconstrued the governing statute. There is nothing in 5 U.S.C. 8341(a)(3)(A) which mandates that a child "live with" his deceased father to the very moment of his death in order to qualify for an annuity. Rather, the statute merely requires a showing that the child "lived with" the parent at some time in the past.

Moreover, the Commission arbitrarily and capriciously distorted and ignored the true facts and the true meaning of the Montana decree in this case. The Commission admits a formal decree of a Montana court issued on June 2, 1972

which judicially decreed the parent-child relationship between Mr. Isaacson, Shawn and Tricia, and that Isaacson was "ordered to support the . . . children" (A. 7). But, the Commission nevertheless erroneously concludes (A. 7): "Under the circumstances, the Board must conclude that the decedent did not live in a parent-child relationship with the . . . children from at least 1972 until the date of his death in 1974."

For these reasons, appellee urges this Court to affirm the judgment of the Court of Claims through a fair, just construction of the governing statute; to resolve this case without reaching the constitutional issues so belatedly and speciously raised by the Government; and to dismiss the Government's appeal because then it would present no necessary constitutional issue for review.

IV

UNDER THE FACTS OF THIS CASE, THE FIFTH AMENDMENT PROHIBITS THE GOVERNMENT FROM DISCRIMINATORILY APPLYING THE "LIVED WITH" REQUIREMENT OF 5 U.S.C. 8341 TO DEPRIVE SHAWN AND TRICIA OF THEIR SURVIVORS' ANNUITY

Under 5 U.S.C. 8341(a)(3)(A), a child whose federal employee father was formally married to the child's mother automatically qualifies for an annuity without the need to show that he ever "lived with" his father or that he even knew his father personally, and irrespective of the fact that his parents may have separated and been divorded years ago.

Similarly, under 5 U.S.C. 8341(a)(3)(A), an adopted child, a stepchild, and even a child for whom a mere petition of adoption was filed likewise automatically qualify for an annuity if they show they lived with a deceased federal employee in a parent-child relationship at the time of his death. Also, a recognized natural

child qualifies for an annuity under the statute, as arbitrarily misconstrued and applied by the Government, if fortunately he too simply lived with the deceased employee in a parent-child relationship at the time of the employee's death.

But, in this case, the Government proposes to deny the same statutory annuity to Shawn and Tricia, albeit the evidence shows (a) they "lived with" the deceased employee in an open parent-child relationship for years prior to 1971, (2) after a full trial, that parent-child relationship was meticulously adjudged and confirmed by a valid Montana decree, and (3) pursuant to the deceased employee's stipulation in the Montana proceeding, the decree in that case ordered him both to provide monthly support payments to Shawn and Tricia and to name them his life insurance beneficiaries at death (A. 6, 7; App. A. hereto). The sole reason stated for this insidious discrimination is that federal admini-

strators construe 5 U.S.C. 8341(a)(3)(A) to require a showing that Shawn and Tricia physically lived with the deceased employee at the very moment of his death.

In Point III, supra, we demonstrated why that baseless statutory construction should be rejected by this Court. But, if it is allowed to stand, then appellee respectfully submits 5 U.S.C. 8341(a)(3)(A), thus applied, is violative of the Fifth Amendment (Jimenez v. Weinberger, 417 U.S. 628, 637, 94 S.Ct. 2496, 41 L.Ed. 2d 363 (1974); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); Gentry v. United States, supra; Tenny v. United States, supra; Proctor v. United States, supra, Myers v. Hampton, supra; Jenkins v. U. S. Civil Service Commission, 460 F. Supp. 611, app. pend. No. 79-1199). As stated by the Court of Claims in Gentry, at 546 F.2d 352:

"The live-with requirement causes the annuity statute to be underinclusive, presumptively denying benefits to nonresident illegitimates who may be dependent. In concluding that the requirement cannot withstand constitutional scrutiny, we can only echo the Court's final remarks in Jimenez. For all that appears from the papers before us, the two subclasses of illegitimates stand on an equal footing, the potential for spurious claims does not differ one to the other, and the different treatment of legitimates, which serves as a guide to the overall purpose of the statute, remains unexplained. On this basis, 'to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws.' 417 U.S. at 637, 94 S.Ct. at 2502. The live-with requirement denies plaintiff due process in violation of the Fifth Amendment."

As indicated, in Gentry the Court of Claims pegged its rulings on this Court's decision in Jimenez v. Weinberger, supra. It also carefully distinguished its rulings under 5 U.S.C. 8341 from this Court's subsequent decision in Matthews v. Lucas, 427 U.S. 495, 96 S.Ct.

2755, 49 L.Ed.2d 651 (1976), upon which the Government relies so heavily in the case at bar, stating at 546 F.2d 352:

"The significant point, and indeed the one that distinguishes Jimenez and the present case from Lucas, is that the excluded illegitimates were nevertheless permitted under the statutory scheme to establish their residence with or dependency on the insured, and thus qualify for benefits. The Court specifically stated: ' * * * this conclusiveness in denying benefits to some classes of afterborn illegitimate children, which belied the asserted legislative reliance on dependency in Jimenez, is absent here, for, as we have noted, any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death.' 427 U.S. at 512, 96 S.Ct. at 2765. Thus, the statute comported with the announced purpose of aiding dependents. The Court found no constitutional defect in Congress' attempt to approximate those who might be dependent, where this did not entail cutting off from benefits those who actually were dependent and did not base the demarcation line on the legitimacy of birth. In

this case, however, as in Jimenez, the classification barring benefits to a subclass of illegitimates frustrates the dependency support scheme, and does so by employing birth status as the index to entitlement."

The vital difference between the case at bar and the situation involved in Matthews v. Lucas, however, was stated even more succinctly by this Court in its decision in Matthews v. Lucas, at 427 U.S. 497 as follows:

"He [the deceased father] died without even having acknowledged in writing his paternity of either Ruby or Darin, and it was never determined in any judicial proceeding during his lifetime that he was the father of either child."

In the case at bar, it was determined in a judicial proceeding during the lifetime of the deceased federal employee that he was the father of both Shawn and Tricia, and he was obliged by judicial decree to support, and did support the children to his death. Thus, as

this Court stated in Matthews v. Lucas, at 427 U.S. 513:

"The presumption of dependency [may be] withheld only in the absence of any significant indication of the likelihood of actual dependency . . .. [W]e agree with the assessment of the three-judge court as it originally ruled in Norton v. Weinberger, 364 F.Supp. 1117, 1128 — :

". . .. When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree . . . would almost as strongly suggest support was subsequently obtained . . .."

Similarly, in Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), this Court ruled that an Illinois statute unconstitutionally discriminated against a child born out of wedlock by providing the child could not inherit from her intestate father unless the father had "acknowledged" her and had also thereafter "legitimated" her by marrying her mother. The Court concluded that these requirements were not substan-

tially related to permissible state interests and that they violated the Equal Protection Clause in a case where the parent-child relationship had been established by judicial decree while the deceased father was alive, and where that judicial decree had found the father responsible for the child's support.

In Lalli v. Lalli, ____ U.S. ____, 99 S.Ct. 518 (1978), New York allowed illegitimate children to inherit from intestate fathers only in cases where a court of competent jurisdiction entered a paternity decree against the father during his lifetime. This Court, consistent with its decision in Trimble v. Gordon, upheld the New York law, stating at 99 S.Ct. 526, 527:

> "Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought

> to light when the distribution of the assets of an estate is in the offing . . ..
>
> "The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. Section 4-1.2 [of the New York law] does not share this defect. Inheritance is barred only when there has been a failure to secure evidence of paternity during the father's lifetime . . .. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock."

This Court emphasized in Lalli that governments are free to require proof of paternity by means other than judicial decree (99 S.Ct. 526, ftnt. 8), but Matthews v. Lucas, Trimble v. Gordon and Lalli v. Lalli, read together, make it clear that arbitrary state or federal exclusions of illegitimate chldren from intestate inheritance or statutory sur-

vivors' benefits are unconstitutional in any case where, as here, during the deceased father's lifetime, a court of competent jurisdiction entered both a valid paternity decree and a judgment ordering him to support his lawful children.

Califano v. Boles, ____ U.S. ____, 99 S.Ct. ____ (1979), decided last June just before the end of this Court's 1978 term, is thus clearly inapposite to this case. First, that case involved a claim for "Mother's Benefits" under the Social Security Act, not direct children's survivor annuities under the Civil Service Retirement Act. Surviving mothers of deceased workers are entitled to "Mother's Benefits" under the Social Security statute only if they are found to be the surviving wife or surviving divorced wife of the father, the wage earner. Thus, the status of children such as Shawn and Tricia in this case was not directly in-

volved in Califano v. Boles, and the Court thus had no reason or occasion to consider in any respect the effect of valid paternity decrees and judgments of support entered in favor of children during the deceased wage earner's lifetime.

In sum and substance, therefore, if this Court concludes the summary judgment entered by the Court of Claims in this case in favor of Shawn and Tricia was indeed based on a finding that the "lived with" requirement of 5 U.S.C. 8341 — as applied by the Government to require a showing that the children physically lived with the deceased father under the same roof up to the very moment of his death — is unconstitutional, we respectfully submit that judgment must be affirmed. Here, the record shows that Shawn and Tricia did live with their deceased father for a considerable period of time, but more decisively, a Montana court of competent

jurisdiction entered both a paternity decree and judgment of support in favor of Shawn and Tricia during their father's lifetime. The Government's application of 5 U.S.C. 8341 to deny them their survivors' annuity was far too narrow and totally unreasonable, and it was foreign to any valid interest of the United States under the Civil Service Retirement Act which seeks to guarantee survivor annuities to all types of unmarried children under 18 years of age — even adopted children, stepchildren and children for whom a petition of adoption was pending when a federal employee dies.

As the Government states in its brief, at pages 27-31, "The Civil Service annuities for survivors are designed to replace support that may have been lost by the wage-earner's death." Here, the wage earner father was ordered by a Montana court to support Shawn and Tricia

and he did support them to the date of his death. Patently, the statutory annuity will operate in this case to replace that support which was lost when Mr. Isaacson accidentally died in 1974.

V

THE "LIVED WITH" REQUIREMENT, AS APPLIED BY THE GOVERNMENT IN THIS CASE, CANNOT BE UPHELD AS NECESSARY TO PREVENT SPURIOUS CLAIMS OR TO FACILITATE ADMINISTRATION OF THE CIVIL SERVICE RETIREMENT ACT IN THE FACE OF (A) THE GOVERNMENT'S FAILURE TO APPEAL FROM A LINE OF DECISIONS WHICH EITHER NULLIFIED THE PROVISION OR ENJOINED ITS ENFORCEMENT AND (B) THE GOVERNMENT'S CURRENT LEGISLATIVE EFFORT PERMANENTLY TO REPEAL THAT REQUIREMENT

In a last-ditch effort to salvage its arbitrary, capricious application of the "lived with" requirement, the Government argues in its brief that it is necessary to discourage spurious claims and to facilitate efficient administration of the annuity statute.

But, at least five (5) courts in the federal system nullified or enjoined fur-

ther enforcement of that requirement before the Government sought to resuscitate it by a belated appeal in this case (Gentry v. United States, supra; Myers v. Hampton, supra; Tenny v. United States, supra; Proctor v. United States, supra; Jenkins v. United States, supra). In each instance, the courts carefully explained why the Government's "spurious claim" and "facilitation of administration" arguments are completely unsustainable in this instance. If preservation of that requirement was truly essential to the prevention of spurious claims or proper administration of the Act, why did the Government acquiesce in those other cases and wait until now to file an appeal in this Court?

Moreover, if preservation of that capricious requirement is so vital to the prevention of spurious claims and to proper administration of the Act, why did the Government itself ask Congress earlier

this year to expedite its complete legislative repeal (Appendix B to this brief)? In this regard, the Government's brief states in a secluded footnote: 10/

> "OPM has recommended legislation that would eliminate the lived-with requirement."

Frankly, the Government's entire position in this case is unfathomable in light of the testimony the head of the Civil Service Retirement System gave before the House Subcommittee on Compensation and Employee Benefits on July 24, 1979, as follows (Appendix C to this brief):

> "The proposed legislation which we have submitted, and which is identical to H.R. 2584, would clarify the statutory purpose of replacing lost support. In this respect, the Office of Personnel Management anticipates that a support requirement would be deemed to be met by all legitimate children, adopted children, and all recognized natural children for whom a judicial determination of support had been obtained. In other words, payment would be made as long as

10/ Government's brief, pg. 38, ftnt. 34.

there was a legal duty of the decedent to support the child. The support requirement would not be met by illegitimate children who received no support from the decedent and who had not obtained any judicial declaration of a support obligation. We support early enactment of H.R. 2584."

In this case, Shawn and Tricia obtained a "judicial declaration of [their father's] support obligation." Why then should this Court adopt a standard in this case which is different from the standard the Government is presently promoting in Congress?

Obviously therefore, the Government's arguments in this regard are utterly baseless, and in justice, they must be overruled by the Court in this case where patently, the claims are valid and readily administrable. 11/

11/ It is clearly wrong for the Government to suggest in its brief that an annuity claim "could be fabricated" in a case such as this, where during the deceased father's lifetime, a court of competent jurisdiction established both his paternity and obligation to support the children (see Government's brief, pg. 35.

--Continued on pg. 57

CONCLUSION

Appellee's motion to dismiss the Government's appeal should be granted, or in the alternative, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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It is also irresponsible for the Government to argue here that some annuity claims may not be filed for 30 years, and that lump sum payments made to other annuitants may then be unrecoverable. Here, the claim was filed on behalf of Shawn and Tricia in 1974, immediately after their father's death. The lump sum payment was made to the decedent's father only after Shawn's and Tricia's claim was denied, and even then the grandfather voluntarily undertook to refund it to the Government if Shawn's and Tricia's claim is sustained – and, of course, he did not defend against the Government's claim for refund in the Court of Claims which the court allowed (see A. 4, 6, 9, 31).

APPENDIX A

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BROADWATER

No. 5625

PATRICIA ILENE CLARK, *Plaintiff*,

v.

GEORGE GERALD ISAACSON, *Defendant*.

Findings of Fact, Conclusions of Law and Judgment

The above-entitled cause came on regularly for trial on the 15th day of May, 1972, before the Court sitting without a jury, Hubert J. Massman, of the Law Firm of Massman, Funk & Swanberg, Horsky Block, Helena, Montana, appearing as counsel for the Plaintiff, and Lloyd J. Skedd, 1225 Eleventh Avenue, Helena, Montana, appearing as counsel for the Defendant, and said action being tried on the 15th, 16th and 17th days of May, 1972, and evidence both oral and documentary having been introduced for and on behalf of the respective parties, and said cause having been duly submitted for decision, and the Court having considered the evidence and the law applicable thereto finds as facts the following:

Findings of Fact

1. That the Plaintiff, PATRICIA ILENE CLARK, is the mother of SHAWN DOUGLAS CLARK, who was born at St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital, Helena, Montana, on January 28, 1971;

2. That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, above described;

3. That GEORGE GERALD ISAACSON is regularly employed and is earning a gross annual salary in excess of Twelve Thousand Five Hundred and no/100 Dollars ($12,000.00), and that PATRICIA ILENE CLARK is regularly employed and is earning a gross annual salary in excess of Eight Thousand Five Hundred and no/100 Dollars ($8,500.00);

4. That the parties stipulated in open Court as follows:

(a) Defendant pay Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) in full and final settlement of any and all past obligations of every kind and nature whatsoever.

(b) Defendant shall change the beneficiaries on the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries:

(1) New York Life Insurance Policy for Ten Thousand and no/100 Dollars ($10,000.00);

(2) Federal Employees Group Life Insurance Policy for Fifteen Thousand and no/100 Dollars ($15,000.00).

(c) Defendant pay Plaintiff the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said minor children, SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK, Ten and no/100 Dollars ($10.00) of which represents medical insurance coverage;

5. The Court finds that the stipulations of the parties are fair and reasonable under the circumstances of this case.

Conclusions of Law

1. That PATRICIA ILENE CLARK is the monther, and GEORGE GERALD ISAACSON is the father, of SHAWN DOUGLAS CLARK, born at St. John's Hospital in Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born in St. Peter's Hospital in Helena, Montana, on January 28, 1971.

2. That the stipulations of the parties, found reasonable and just by this Court, should be made a part of the Judgment in this cause.

Judgment

Upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the Defendant, GEORGE GERALD ISAACSON, is the father of SHAWN DOUGLAS CLARK, who was born in St. John's Hospital, Helena, Montana, on April 13, 1968, and of TRICIA DEANNE CLARK, who was born at St. Peter's Hospital in Helena, Montana, on January 28, 1971.

(2) That Defendant pay to the Plaintiff on or before the 1st day of June, 1972, the sum of Five Thousand and no/100 Dollars ($5,000.00) as full and final settlement of all past obligations between the parties of every kind and nature whatsoever.

(3) That Defendant pay to the Plaintiff, through the Clerk of the above-entitled Court, the sum of Sixty and no/100 Dollars ($60.00) per month for each of the said children (Ten and no/100 Dollars ($10.00) of which shall represent medical insurance costs for each child); said payments shall commence on the 1st day of June, 1972, and shall be paid on the 1st day of each month thereafter until such time as each of the said children shall reach their age of majority.

(4) That Defendant change the beneficiaries under the following policies to make SHAWN DOUGLAS CLARK and TRICIA DEANNE CLARK first beneficiaries, to-wit:

(a) New York Life Insurance Policy in the amount of Ten Thousand and no/100 Dollars ($10,000.00).

(b) Federal Employees Group Life Insurance Policy in the amount of Fifteen Thousand and no/100 Dollars ($15,000.00).

The change in beneficiaries herein ordered shall be subject to Court approval.

DATED this 2nd day of June, 1972.

/s/ GORDON R. BENNETT
District Judge

APPENDIX B

96TH CONGRESS
1ST SESSION

H. R. 2584

To amend title 5, United States Code, to provide survivor benefits to certain dependent children.

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 1979

Mrs. SPELLMAN (by request) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

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A BILL

To amend title 5, United States Code, to provide survivor benefits to certain dependent children.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8341(a)(3) of title 5, United States Code, be amended to read as follows:

"(3) 'child' means—

"(A) an unmarried dependent child under 18 years of age, including (i) an adopted child, (ii) a stepchild or recognized natural child, and (iii) a child who lived with and for whom a petition of

adoption was filed by an employee or Member, and who is adopted by the surviving spouse of the employee or Member after his death;

"(B) such unmarried dependent child regardless of age who is incapable of self-support because of mental or physical disability incurred before age 18; or

"(C) such unmarried dependent child between 18 and 22 years of age who is a student regularly pursuing a full-time course of study or training in residence in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution.

For the purpose of this paragraph and subsection (e) of this section, a child shall be deemed dependent on the employee or Member if, at the time of the employee or Member's death, the employee or Member was either living with or contributing to the support of such child. The Office of Personnel Management shall prescribe regulations to further define dependency for purposes of this section. A child whose 22d birthday occurs before July 1 or after August 31 of a calendar year and while he is regularly pursuing such a course of study or training, is deemed to have become 22 years

of age on the first day of July after that birthday. A child who is a student is deemed not to have ceased to be a student during an interim between the school years if the interim is not more than 5 months and if he shows to the satisfaction of the Office of Personnel Management that he has a bona fide intention of continuing to pursue a course of study or training in the same or different school during the semester (or other period into which the school year is divided) immediately after the interim.".

SEC. 2. Section 8901(5) of title 5, United States Code, is amended to read as follows:

"(5) 'member of family' means the spouse of an employee or annuitant and an unmarried dependent child under 22 years of age, including—

"(A) an adopted child; and

"(B) a stepchild, foster child, or recognized natural child or such an unmarried child regardless of age who is incapable of self-support because of mental or physical disability which existed before age 22.

For purposes of this paragraph, a child shall be deemed dependent on the employee or Member if the employee or Member is either living with or contributing to the support of such child. The Office of Person-

nel Management shall prescribe regulations to further define dependency for purposes of this section.".

SEC. 3. This Act shall take effect upon enactment except that no benefits under chapter 89 of title 5, United States Code, authorized by this Act shall be payable for any period prior to the date of enactment.

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APPENDIX C

STATEMENT OF RAYMOND C. WEISSENBORN,
DIRECTOR, COMPENSATION DIVISION, OFFICE OF PERSONNEL MANAGEMENT

BEFORE

SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 2583, TO DISCONTINUE CIVIL SERVICE ANNUITY PAYMENTS FOR PERIODS OF EMPLOYMENT AS A JUSTICE OR JUDGE OF THE UNITED STATES; ~~H.R. 2584, TO PROVIDE SURVIVOR BENEFITS TO CERTAIN DEPENDENT CHILDREN;~~ AND S. 383, TO EXTEND CERTAIN BENEFITS TO FORMER EMPLOYEES OF COUNTY COMMITTEES ESTABLISHED PURSUANT TO SECTION 8(b) OF THE SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT.

Tuesday, July 24, 1979

I would next like to discuss the provisions of H.R. 2584, which pertains to providing survivor benefits to certain dependent children of deceased federal employees and annuitants.

The Civil Service Retirement law currently requires that a recognized

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natural child has to be living with his or her deceased parent in a regular parent-child relationship in order to be eligible for a child's survivor annuity benefit. However, this "living-with" requirement has been declared unconstitutional in several recent court decisions.

On November 30, 1977, a three-judge court for the U.S. District Court for the District of Columbia enjoined the Office of Personnel Management's predecessor agency, the Civil Service Commission, from applying the "living-with" requirement to recognized natural children of a deceased federal employee (Reference: Proctor v. United States). This case was followed by Jenkins v. United States Civil Service Commission, in which the Office of Personnel Management has been ordered by the same district court now to pay benefits retroactively to the day following the employee's death to recognized natural children of all employees or retirees whose death occurred on or after February 24, 1972. Retroactive payment prior to December 1, 1977, has been stayed by the court pending a decision by the Supreme Court in Clark v. United States, still another case involving payment of survivor benefits to non-resident recognized natural children. In Clark, the Supreme Court will consider both the constitutionality of the "living-with" requirement and whether or not, if the statute is not constitutional, retroactive payments can be ordered.

It is apparent that the elimination of the "living-with" requirement by these court decisions warrants a reconsideration of the definition of

"child" for civil service survivor annuity purposes. The proposed legislation which we have submitted, and which is identical to H.R. 2584, would clarify the statutory purpose of replacing lost support. In this respect, the Office of Personnel Management anticipates that a support requirement would be deemed to be met by all legitimate children, adopted children, and all recognized natural children for whom a judicial determination of support had been obtained. In other words, payment would be made as long as there was a legal duty of the decedent to support the child. The support requirement would not be met by illegitimate children who received no support from the decedent and who had not obtained any judicial declaration of a support obligation. We support early enactment of H.R. 2584.